

Internal Revenue Service

memorandum

CC:TL-N-3021-90

VWATERS

date: FEB 27 1990

to: District Counsel, Buffalo CC:BUF
Attn: Jerome F. Warner

from: Acting Branch Chief
Tax Shelter Branch CC:TL:TS

subject: [REDACTED] - Proper Designation of TMP
TL-N-3021-90 [REDACTED]
CC:TL:TS Waters Wilson
I.R.C. § 6231
tax matters partner, period of limitations

This is in response to your January 24, 1990 request for tax litigation regarding the above-mentioned subject.

ISSUE

Whether the Tax Court has jurisdiction over a petition where the Service issued a notice of final S corporation administrative adjustment ("FSAA") to an improper tax matters person ("TMP") and did not issue a generic FSAA?

CONCLUSION

Where the Service issued an FSAA to the improper TMP, and no generic FSAA was issued, the Tax Court does not have jurisdiction over the petition based on the faulty FSAA. The Service should file a motion to dismiss for lack of jurisdiction.

FACTS

On [REDACTED], a Form 1120S for the taxable year [REDACTED] was filed on behalf of [REDACTED] with the Service Center bearing the signature [REDACTED]. Attached to the return were Schedules K-1 naming the shareholders as [REDACTED] and [REDACTED] (1% interest) and [REDACTED] and [REDACTED] (1% interest). No designation of a TMP was attached to this return. On [REDACTED], a notice of the beginning of an administrative proceeding ("NBAP") was sent to [REDACTED], Tax Matters Person, c/o [REDACTED]. No response was received by the Service pursuant to that notice.

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Prior to the issuance of the NBAP, the revenue officer had discussed the S corporation return with [REDACTED] and arranged for a meeting on [REDACTED]. At that meeting, [REDACTED] was provided a copy of the Examination report relative to the adjustments to the corporate return. On [REDACTED], a response to the summary report was submitted to the revenue officer which bore the signature of [REDACTED]. This response was hand-delivered by [REDACTED].

On [REDACTED], a notice of Final S Corporation Administrative Adjustment ("FSAA") was sent to [REDACTED], Tax Matters Person, c/o his home address. The Service did not issue a generic notice at the S corporation address. On [REDACTED], a petition was filed in the Tax Court by an attorney which listed the petitioner as [REDACTED], Tax Matters Person. On [REDACTED], respondent filed its answer with the court.

The period of limitations on assessment of tax under I.R.C. § 6229, as incorporated by section 6244, has now expired.

DISCUSSION

The unified audit and litigation provisions ("TEFRA") are generally extended to and made applicable to S corporations by section 6244. If an S corporation is subject to TEFRA, the Service is required to mail an FSAA to the tax matters person ("TMP") prior to the assessment and collection with respect to any deficiency attributable to any S corporation item. I.R.C. § 6225(a).

Pursuant to section 6231(a)(7)(A), the TMP of any S corporation is a shareholder designated by the S corporation to be the TMP. If there is no shareholder who has been so designated, the TMP is the shareholder having the largest profits interest in the S corporation at the close of the taxable year involved. I.R.C. § 6231(a)(7)(B). If more than one shareholder has the largest profits interest, then the TMP is the shareholder whose name appears first alphabetically. However, if there is no shareholder designated by the S corporation to be the TMP and the Secretary determines that it is impracticable to apply the largest profits interest rule, the shareholder selected by the Secretary shall be treated as the TMP. I.R.C. § 6231(a)(7).

In this case, the S corporation had not designated any shareholder as TMP. The Service sent an FPAA to [REDACTED] as TMP even though he only held a [REDACTED]% profits interest and another shareholder held a [REDACTED]% profits interest. Under section 6231(a)(7), the Service may not designate a TMP even though the S corporation has not done so, unless it is impracticable to apply the largest profits interest rule. There was no determination in

this case that it was impracticable to apply the largest profits interest rule. Accordingly, the [REDACTED] shareholder was the TMP by operation of law.

[REDACTED] did not object to the Service's treatment of him as TMP or otherwise indicate that he was not the TMP. Moreover, he filed a petition with the Tax Court as the TMP. Arguably, the Service could assert an equitable estoppel defense where the S corporation has represented a shareholder to be the TMP and the Service reasonably relied, to its detriment, on such representation in issuing an FSAA. Our office's previous position regarding an estoppel defense was that it could be raised where: (1) a statement of fact was made which was otherwise unknown to the Service; (2) the Service reasonably relied on the statement of fact; and (3) the Service suffered a detriment by its reasonable reliance. Since the above defense can normally only be used against the person making the misstatement, in the context of a TEFRA proceeding involving an S corporation, the shareholder other than a purported TMP would also have to make a false statement (or at least fail to object when made aware of the false statement) in order for this doctrine to apply to them. See Piarulle v. Commissioner, 80 T.C. 1035 (1983). But cf. Barbados #7, Ltd. v. Commissioner, 92 T.C. 804 (1989) (estoppel may apply where Service is not informed of TMP bankruptcy, thus making reliance reasonable) (dicta). In the context of this case, we also note that it would be difficult to demonstrate that the Service's reliance on [REDACTED]'s failure to indicate that he was not the TMP was reasonable where it was clear under section 6231(a)(7) that he was not the TMP. Because of the numerous legal and factual problems with asserting the doctrine of equitable estoppel, we no longer authorize the use of an estoppel argument where the Service issues an FSAA to an improper TMP.

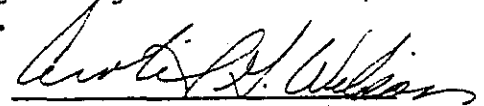
We note that the Service did not mail a notice of FSAA to the "Tax Matters Person" (a generic notice) at the S corporation address.¹ Because the Service issued the FSAA to an improper TMP and did not issue a generic notice, the period of limitations for the [REDACTED] taxable year continued to run and has now expired. In general, the period for assessing any tax imposed by subtitle A attributable to S corporation or affected items shall not expire before 3 years after the later of the date the corporate return was filed or the last day for filing such a return. I.R.C. § 6229(a). The issuance of an FSAA to the TMP will toll the period

¹ We recommend that the Service issue a generic notice in all cases. The validity of generic notices has been upheld in Chomp Associates v. Commissioner, 91 T.C. 1069 (1988); Seneca Ltd. v. Commissioner, 92 T.C. 363 (1989); and Barbados #7 Ltd. v. Commissioner, 92 T.C. 804 (1989).

of limitations pursuant to section 6229(d). If the Service issues an FSAA to an improperly designated TMP, the suspension provision of section 6229(d) does not apply. In this case, the S corporation filed its return for the [REDACTED] taxable year on [REDACTED]. The Service mailed a notice of FSAA to the improperly designated TMP on [REDACTED]. Because the issuance of that FSAA did not suspend the period of limitations, the period of limitations expired on [REDACTED].

Finally, [REDACTED] filed a petition for redetermination of the S Corporation items on [REDACTED], as TMP. However, because the Service issued the FSAA to an improperly designated TMP, the Tax Court lacks jurisdiction over the proceeding. Accordingly, the Service should file a motion to dismiss for lack of jurisdiction based on the invalid FSAA. The motion to dismiss should state that section 6223(a) requires the Service to mail an FSAA to the TMP. Secondly, the motion should state that if the notice requirement is not satisfied, any assessment and collection activity with respect to a deficiency attributable to any S corporation item may be enjoined. I.R.C. § 6225(b). Third, the motion should outline the requirements of section 6231(a)(7) regarding the selection of the TMP and that the Service did not satisfy these requirements by treating [REDACTED] as TMP. Fourth, the motion should state the FSAA for taxable year [REDACTED] issued to [REDACTED] as TMP was invalid. Finally, it should state that the court lacks jurisdiction since the FSAA was invalid.

If you have any additional questions regarding this matter, please contact Vada Waters at (FTS) 566-3289.


CURTIS G. WILSON